

Revenue determination guideline for non-contestable network infrastructure projects

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About the Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is leading social justice law and policy centre. Established in 1982, we are an independent, non-profit organisation that works with people and communities who are marginalised and facing disadvantage.

PIAC builds a fairer, stronger society by helping to change laws, policies and practices that cause injustice and inequality. Our work combines:

- legal advice and representation, specialising in test cases and strategic casework;
- research, analysis and policy development; and
- advocacy for systems change and public interest outcomes.

Energy and Water Consumers' Advocacy Program

The Energy and Water Consumers' Advocacy Program works for better regulatory and policy outcomes so people's needs are met by clean, resilient and efficient energy and water systems. We ensure consumer protections and assistance limit disadvantage, and people can make meaningful choices in effective markets without experiencing detriment if they cannot participate. PIAC receives input from a community-based reference group whose members include:

- Affiliated Residential Park Residents Association NSW;
- Anglicare;
- Combined Pensioners and Superannuants Association of NSW;
- Energy and Water Ombudsman NSW;
- Ethnic Communities Council NSW;
- Financial Counsellors Association of NSW;
- NSW Council of Social Service;
- Physical Disability Council of NSW;
- St Vincent de Paul Society of NSW;
- Salvation Army;
- Tenants Union NSW; and
- The Sydney Alliance.

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The Public Interest Advocacy Centre office is located on the land of the Gadigal of the Eora Nation

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1. Introduction

PIAC welcomes the opportunity to respond to the Australian Energy Regulator's (AER) Guideline on the Transmission Efficiency Test and revenue determination guideline for non-contestable network infrastructure projects (the guideline).

PIAC appreciates the difficulty imposed by the 6-month timeframe the NSW Energy Electricity Act 2020 (the EII Act) allows for the AER to approve a revenue determination for a non-contestable project. We support the introduction of a preliminary position paper to the determination process.

As noted by the AER in the public webinar, the effectiveness of the process rests on the early identification of the key contentious issues. This in turn depends on the expertise and experience of the AER staff and adequate stakeholder resourcing to

- assist with identifying these issues at the start of the process, and
- consider the issues and produce preferences regarding them within the circumscribed consultation process.

These are not realistic assumptions. While industry stakeholders may be equipped to provide input with adequate turnaround, this is unlikely to be the case for any consumer stakeholders. Even the few organisations able to engage with determinations on non-contestable projects (such as PIAC) are likely to struggle to provide incisive and informed analysis at the start of the process. In short, the constrained timeline can be expected to exacerbate the existing resource imbalance between consumer and industry advocates.

PIAC proposes that to manage this problem, the AER establishes a standing reference group to provide expert input to the AER on all revenue determination processes for non-contestable projects that fall under the EII Act. This panel would operate outside the timeframe of any particular revenue determination and would provide input into particular processes on the basis of a pre-existing foundation of familiarity and experience with the regulatory framework enabling more rapid response.

The following section provides a framework for how such a reference group could work and comments on two further issues on concern in the processing of financeability issues and the need for a pre-specified triggers for the AER to request an extension for a determination.

2. A standing reference panel

Design elements of the standing panel

A standing reference panel could have responsibility for the following:

- Providing feedback and advice on the functioning of the revenue determination for non-contestable projects under the EII Act framework;
- Providing input into the consultation processes for individual projects, in particular providing input to the AER to inform the 'preliminary position paper';

- Be available for network operators to consult on planned revenue applications before they are submitted to the AER;
- Assist the AER in identifying stakeholders whose engagement should be actively sought for a given project; and
- Assist the AER to provide the correct amount and type of information for different stakeholders.

The panel should be composed of approximately four members, at least two of which should be drawn from consumer-representative organisations with established expert credentials in energy. The respondents to the Waratah Super Battery determination are the obvious initial options.

We recommend the panel have regular quarterly meetings scheduled well ahead of time in order to lock in calendar dates. These meetings can be cancelled or shortened if they turn out not to be needed. They can be augmented with meetings relating to specific revenue determinations as required.

Value of the standing panel

As it currently stands, the consultation process rests on the hope that controversial issues will be obvious and emerge early in the process. The creation of an expert panel would provide a more consistent and robust mechanism beyond hope and the expertise of AER staff to improve the likelihood of this occurring.

There are also two very short turnarounds within the proposed consultation timeline - after the network operator submits their application (18 business days) and after the AER's draft decision (28 business days). It is likely that stakeholders with competing demands on their time will struggle to provide high quality feedback within these timeframes for every revenue determination that occurs under this framework. The panel would have responsibilities for working with the AER to identify relevant stakeholders and engage with them actively before and during these tight turnaround periods and in doing so boost the engagement capacities of respondents.

The panel would assist the AER to pursue the good engagement practice it expects from the network businesses it regulates. The expectations for consultation under the conditions of a constrained time frame are not different from the normal expectations.

These include but are not limited to:

- Establishing cultures of genuine engagement, in this case both at the AER and network operators;
- Having clarity of purpose in the consultation;
- Consulting using objective-driven processes, rather than deferring to strategies defined more by commitment to pre-existing processes;
- Providing information to respondents that is accessible, of the 'correct' volume and detail, and available by request;

- Correctly identifying the appropriate stakeholders to consult; and
- Being flexible in one's plans.

A number of these aims are threatened by a highly circumscribed consultation process, and these threats would be materially mitigated by the existence of a standing panel.

3. Financeability concerns

PIAC supports the AER's intention to assess financeability issues on a whole of regulated business basis.

To do any differently would create a bias towards network businesses profits being above the regulated rate of return for reasons other than efficiencies exceeding the regulator's expectations.

We note that the regulatory approach of the EII Act is generally project-based. If there are other areas than financeability where such an approach is in conflict with the National Energy Rules (NER), the AER should provide explicit guidance on how these tensions will be managed.

4. Flexibility within the constrained determination timeframe

As noted, the AER anticipates that the relatively expedited process should function effectively if contentious issues are identified early in the revenue determination process. Notwithstanding mechanisms to ensure this happens, the possibility of a 'sleeper issue' emerging late in the process will always remain.

In order to avoid the situation where the AER considers it must approve a proposal in spite of the emergence of an issue it does not have time to assess adequately, clear guidelines should be established to manage the situation and empower the AER to seek an extension before making a determination. In order to balance the aim of providing certainty for the network operator with ensuring consumers receive fair value, triggers for an extension could include a threshold of materiality that is calculated as a proportion of the cost of the project overall.

5. Continued engagement

We welcome the opportunity to meet with the AER and other stakeholders to discuss these issues in more depth. Please contact Michael Lynch at [REDACTED] regarding any further follow up.